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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS F. SMITH, JR., et al.,

Petitioners,

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

Respondents.

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Can plaintiffs, who allege substantial constitutional claims which are not addressed in view of plaintiffs' total success on a non-fee statutory claim, be denied an award of attorneys fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980), and contrary to the express intent of Congress?

2. Can plaintiffs, who allege a substantial claim under § 504 of the Rehabilitation Act in addition to substantial constitutional claims, none of which is addressed in view of plaintiffs' total success on a non-fee statutory claim, be barred from receiving an award of attorneys fees under § 505(b) of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 794a(b), contrary to this Court's reasoning in Maher v. Gagne, and contrary to the express intent of Congress?

LIST OF THE PARTIES

Petitioners, plaintiffs-appellees below, are THOMAS F. SMITH, JR., and URSULA J. SMITH, parents, guardians, and next friends of Thomas F. Smith, III, and THOMAS ["TOMMY"] F. SMITH, III.

Respondents, defendants-appellants below, are WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, and ARTHUR PONTARELLI, Rhode Island Commissioner of Education.

The local education agency defendant below, the Cumberland School Committee, is no longer a party to this proceeding.

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the First Circuit, reversing the trial court and denying attorneys fees to petitioners, is reported as Smith v. Cumberland School Committee, 703 F.2d 4 (1st Cir. 1983). A copy of the decision, entered on March 24, 1983, is attached as Appendix A to the Certiorari Petition, A. 1-21.

The decision of the U.S. District Court for the District of Rhode Island, awarding attorneys fees to petitioners, is unreported. The decision is set forth in a final order entered on June 11, 1982, in an earlier order of June 5, 1982 with two attachments, and in the transcript of the trial court's oral opinion from the bench on April 30, 1982, all of which are attached as Appendix B to the Certiorari Petition, A. 22-58.

JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on March 24, 1983. A petition for a writ of certiorari was filed on June 22, 1983, and certiorari was granted on October 31, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOVLED

This case involves the construction and application of two fee-shifting statutes, enacted by Congress in 1976 and 1978, respectively.

1. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42]. . . the court, in its discretion, may allow the prevailing party, other than the

> United States, a reasonable attorney's fee as part of the costs.

2. Section 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), which was added to the Rehabilitation Act through amendments enacted in 1978, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves the Education for All Handicapped Children Act of 1975. Section 615(e)(2) of that Act, 20 U.S.C. § 1415(e)(2), which authorizes judicial review but which does not expressly authorize attorneys fees, provides in relevant part:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

STATEMENT OF THE CASE

Petitioners -- plaintiffs below -- challenged the exclusion of petitioner Thomas ["Tommy"] F. Smith III from receiving a free public education solely because of his handicap. Petitioners, in addition to asserting state law violations, alleged due process and equal protection claims under § 1983, a claim under the Rehabilitation Act of 1973 as amended in 1978, and a claim under the Education for all Handicapped Children Act of 1975 [the "EAHCA"]. Petitioners won the relief sought in this litigation -- a free public education for Tommy -- initially through a series of preliminary injunctions based on petitioners' due process claim, and ultimately through a permanent injunction and a declaratory judgment based upon an interpretation of state law (a ruling which avoided unnecessary adjudication of petitioners' federal claims).

Because petitioners were prevailing parties, and in view of the relief won by petitioners through their due process claim and based upon the substantiality of their equal protection claim, the district court awarded fees to petitioners under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 [the "1976 Fees Act" or "§ 1988"].

The First Circuit, while not disputing the fact that petitioners were prevailing parties and not disputing the substantiality of petitioners' constitutional claims, reversed the fee award under the 1976 Fees Act on the ground that a fee award was precluded by petitioners' claim under the EAHCA, a federal statute which does not itself authorize fees. Based on the same reasoning, the First Circuit also held that petitioners, who had asserted a substantial claim under § 504 of the Rehabilitation Act, were not entitled

to fees under § 505(b), 29 U.S.C. § 794a(b), the fee provision added to the Rehabilitation Act in 1978.

The issues raised here directly concern only petitioners' entitlement to fees. Resolution of these issues flows from petitioners' claims and success on the merits.

A. Proceedings on the Merits

Petitioner Tommy Smith, a physically and emotionally handicapped child who walks with the aid of leg braces and crutches due to cerebral palsy, was eight years old when this litigation began. J.A. 9-10, 33.[1] Because he was both orthopedically impaired and emotionally disturbed, Tommy was then enrolled in a special education program at Bradley

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1. Citations to documents in the Joint Appendix are referred to herein as "J.A. ___"; citations to documents in the Certiorari Petition Appendix are referred to as "A. _____"; and citations to other documents in the Record are referred to by descriptions of the documents cited.

Hospital, a day program approved by respondent Commissioner of Education and paid for in part by the Cumberland School Committee. J.A. 9-10, 33, 54-55, 68, 80, 130. There was never any dispute in this litigation that the special education program, designed to provide "special education" and "related services" to children with Tommy's handicapping conditions, in fact provided Tommy with an "appropriate" education. J.A. 9-10, 25-26, 33-34, 62, 86, 130.

This litigation was initiated shortly after the Cumberland School Committee, on November 5, 1976, formally advised petitioners that it would no longer pay the costs of Tommy's state-approved special education program. J.A. 10-12, 25-26, 27-28, 30-31, 34. The dispute in this case ultimately focused not only on who was responsible for paying the costs but also on whether Tommy in fact would continue to receive an educa-

tion. In petitioners' view, since Tommy was a handicapped child residing in Cumberland, Rhode Island, the local School Committee was legally responsible for paying the costs of Tommy's state-approved special education program. J.A. 9-10, 51-52, 86, 155. The contrary position initially advanced by the School Committee, and thereafter pursued by the officials of the Rhode Island Department of Education, respondents here, was that Tommy, in addition to being orthopedically impaired, was an emotionally disturbed child as defined by state law and that his education and care were the responsibility of the state Department of Mental Health, Retardation and Hospitals ["MHRH"]. J.A. 25-26, 34, 71, 86, 99-102, 105, 109, 164-66.

The result of respondents' position, had it been effectuated, would have required Tommy's eventual placement in an MHRH program for which petitioners would have been obli-

gated to pay part of the costs. J.A. 101, 162, 138-44. Moreover, given the lengthy waiting list of emotionally disturbed children waiting to enter the underfunded MHRH program, respondents' position, if successful, would have required the immediate exclusion of Tommy from the special education program at Bradley Hospital followed by the provision of no state education through the MHRH program during the lengthy waiting period. J.A. 70, 85,138-44.

On November 26, 1976, petitioners sued the members of the Cumberland School Committee in federal court for violating the fourteenth amendment and particularly for violating the Due Process Clause by proposing the immediate termination of Tommy's special education without first providing petitioners a hearing under the applicable state regulations. J.A. 8-26. Based on the strength of their due process allegations, petitioners

won, on December 9, 1976, a TRO restraining the School Committee defendants from failing to maintain Tommy in the education program at Bradley. J.A. 27-29. On December 22, 1976, that restraining order was continued as a preliminary injunction. J.A. 30-31. That injunction in turn was continued, on January 17, 1977, to remain effective essentially until petitioners received their requested hearing and exhausted state hearing and appeal procedures. J.A. 32-48.

The School Committee defendants, after a hearing, rendered a decision reaffirming the earlier decision not to pay the costs of Tommy's education. J.A. 66-72. Following petitioners' state administrative appeal, respondents Commissioner and Associate Commissioner of Education similarly ruled on April 17, 1978 that Tommy's education was not the responsibility of the Rhode Island public

school system. J.A. 77-102.[2]

Immediately thereafter, with the administrative appeals concluded, petitioners were granted leave by the district court to file a First Amended Complaint, which added as defendants the respondents here, and which added to petitioners' constitutional claims a claim under the recently effective[3] Education for All Handicapped Children Act of 1975 ["EAHCA"]. J.A. 49-102.

Rather than proceeding -- perhaps unnecessarily -- to final judgment on petitioners' federal constitutional and statutory

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2. Respondents' ruling, reflecting the state's official position, was based solely on an interpretation of state law. J.A. 86-102. Respondents specifically declined to consider petitioners' arguments "based on various federal statutes and regulations and, ultimately, on the Supremacy Clause of the United States Constitution" on the ground that these matters were "not within our jurisdiction." J.A. 101 n.12.

3. The major substantive provisions of the EAHCA of 1975, Pub. L. No. 94-142, 89 Stat. 773, became effective on October 1, 1977. See Pub. L. No. 94-142, § 8(c), 89 Stat. 796.

claims, the district court at this point decided to certify the underlying state law dispute (whether conflicting state statutes placed the responsibility for educating resident handicapped children such as Tommy on the public school system, as petitioners argued, or on MHRH, as respondents had found) to the Rhode Island Supreme Court. J.A. 108-26. In reaching this decision, the district court pointed out that the result sought by petitioners in fact seemed to be required both by state law and by the recently effective federal EAHCA, J.A. 110-14, and that, in any event, if the state "statutes cannot be interpreted to conform with federal regulatory requirements, the Supemacy Clause of the Constitution dictates finding such non-conforming law violative of the federal statutory scheme," J.A. 119. Nonetheless, because "resolution" of the issue "will have far reaching effects throughout the state," J.A.

121, 124, because of the fact that petitioners "already enjoy preliminary injunctive relief" based on their due process claim, J.A. 121, and because the delay caused by certification accordingly would not "endanger any of [petitioners'] 'valuable federal rights,'" J.A. 121 (citation omitted), the district court certified the state law questions "in order to avoid unnecessary adjudication of constitutional and federal claims," J.A. 122, 124-25.

The Supreme Court of Rhode Island, on June 3, 1980, rendered a decision in petitioners' favor on the two state law questions certified by the district court, J.A. 129-51; see 415 A.2d 168 (1980). It stated at the outset of its decision that the state statutes "must be viewed in the context of the Education for All Handicapped Children Act of 1975," J.A. 134; and it concluded that, as a matter of state law, the Rhode

Island statutes placed the responsibility for the education of resident handicapped children such as Tommy on the public school systems under the jurisdiction of respondents, and not on MHRH, J.A. 133-51.

In addition to this state court victory, petitioners in the interim had won another favorable ruling from the district court: in response to petitioners' motion to modify the continuing due process preliminary injunction so as to have Tommy placed in a "less restrictive school environment" in view of the "substantial progress" that Tommy had made in the day program at Bradley Hospital,[4/] the district court modified the preliminary injunction to require that Tommy now be provided special education in the less restrictive environment day program at Harmony Hill School, J.A. 127-28.

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4. See Motion to Modify Preliminary Injunction filed in the district court on June 13, 1979. See also J.A. 127-28, 173-74, 190-91.

Subsequent to the modified due process injunction, and subsequent to the state Supreme Court's decision rendered in their favor, petitioners were granted leave to file a Second Amended and Supplemental Complaint, in which petitioners made clear that one of their constitutional claims was based on the Equal Protection Clause of theFourteenth Amendment, and in which petitioners added a claim under § 504 of the Rehabilitation Act. J.A. 152-68.

The district court thereafter issued an order declaring petitioners' rights and entering a permanent injunction. J.A. 172-76. In that order, the district court held, based upon the "applicable federal statutes and regulations," that Tommy was "entitled to have the full cost of his attendance at Harmony Hill School paid by the Cumberland School Committee" and that Tommy was "entitled to the benefit of all the proce-

dural safeguards contained in [the EAHCA with regard to] his placement in the special education program at Harmony Hill School and any and all other special education programs in which he may be enrolled in the future." J.A. 174-75.

Respondents nonetheless continued to contest their liability, a contest which resulted in a memorandum and order denying respondents' motion to dismiss, J.A. 177-78, and in a final order on the merits, J.A. 189-94. In the former, the district court held that petitioners had stated a claim under § 504 of the Rehabilitation Act, J.A. 178-79; recognized that the court in any event had "already held, in an opinion issued January 17, 1977 [see J.A. 32-48], that § 1983 affords the [petitioners] a cause of action here," and that "this is now the law of the case," J.A. 179; held that respondents in this suit for injunctive relief were not

protected by any good faith immunity, J.A. 179-81; and reaffirmed respondents' executive authority over and responsibility for the activities of local educational agencies, J.A. 182-87. This denial of respondents' motion to dismiss was subsequently affirmed on appeal by the First Circuit.[5/]

In its final order on the merits, the district court, "in light of the applicable federal and state statutes and regulations," J.A. 191, reiterated its earlier findings and declarations, J.A. 190-93; recognized that at "all times relevant to this action, Tommy has attended special education programs under the jurisdiction of the . . . Rhode Island Board of Regents for Education, the same being licensed by the [respondent], Rhode Island Commissioner of Education," J.A. 191; held

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5. See the one-page, unreported decision by the First Circuit in Smith v. Cumberland School Committee, Nos. 81-1454 and 81-1499 (1st Cir. Jan. 11, 1982), filed in the district court on January 12, 1982.

that respondents' official position was void as contrary to the decision rendered by the Rhode Island Supreme Court, J.A. 192-93; and concluded that since petitioners "as a matter of state law" had "obtained the object of their suit . . . it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims," J.A. 193. Petitioners were allowed two weeks to "move for an award of fees" against respondents. J.A. 193.

B. **Proceedings as to Fees**

Subsequent to the district court's recognition that they had "obtained the object of their suit," J.A. 193, petitioners on June 23, 1981, moved for an award of attorneys fees against respondents,[6] J.A.

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6. Petitioners were never forced to file a motion for fees against the Cumberland School Committee defendants. Instead, petitioners and the School Committee defendants settled petitioners' fee claim representing the time expended in proceedings against [cont'd. on next pg]

195-96. Consideration of petitioners' motion was initially stayed at respondents' request in view of the appeal from the district court's denial of respondents' motion to dismiss. J.A. 6. After the First Circuit affirmed the denial of respondents' motion to dismiss and further observed that petitioners had "won, as a matter of state law, all that [they] originally sought," see supra p. 17 note 5, the district court held a hearing on petitioners' fee request and thereafter rendered an oral decision from the bench awarding fees to petitioners, A. 31-58.

As the district court pointed out in its oral decision, respondents objected to any fee award[7] on the ground that petitioners

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the School Committee defendants for $8,000. J.A. 176. This time expended was eliminated from the petitioners' fee claim against respondents. A. 35-36, 39, 53-55.

7. Respondents also objected -- in the district court, A. 36-39, and on appeal, A. 7 -- to certain criteria used in calculating the amount of the fee award. Since the First Circuit never addressed the [cont'd. on next pg]

had alleged a claim under the EAHCA, a federal statute which does not itself expressly authorize fees. A. 37, 39. In rejecting this argument and in awarding fees under the 1976 Fees Act, the district court pointed out that the "complaint in this action was brought under the Constitution and laws of the United States, more specifically the due process and equal protection clauses of the 14th Amendment." A. 34-35. Both the due process claim and the equal protection claim were recognized by the district court as substantial constitutional claims.

The substantiality of the due process claim had been established earlier through the preliminary injunctive relief entered on that claim on December 22, 1976, J.A. 30-31, and on January 17, 1977, J.A. 32-48; through the court's ruling that the due process claim

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amount of the fee award but only entitlement to fees, A. 7, the only issues before this Court concern petitioners' entitlement to fees.

gave rise to a "cause of action . . . created by 42 U.S.C. § 1983," J.A. 33, 179; through the court's modification of the preliminary injunction well after respondents had been added as defendants, J.A. 127-28; and through the court's recognition of the substantiality of petitioners' § 1983 due process claim in its denial of respondents' motion to dismiss, J.A. 177-88.

The substantiality of petitioners' equal protection claim was also expressly recognized by the district court, A. 42-43:

> [Respondents give] little significance to [petitioners'] allegation of discriminatory treatment in violation of the equal protection claim [in] the second amended complaint and of the 42 United States Code, Section 1983 claim. I want to add there I find that the equal protection claim is colorable and non-frivolous. Be that as it may, enough has been said to establish that the [petitioners] have made a substantial constitutional claim even if that claim ultimately would not have prevailed. [Petitioners] are

> therefore entitled to attorney's fees to the extent they have prevailed in an action or proceeding to enforce their 1983 claim. 42 U.S.C. § 1988.

Petitioners accordingly were held entitled to fees,[8] with petitioners' lawyer ultimately being awarded $32,109 in fees. A. 22.

The First Circuit, in the decision under review here, reversed, holding that "fees are not available here at all." A. 7. See generally 703 F.2d 4 (1st Cir. 1983). Overlooking the fact that petitioners had won significant relief throughout this litigation based on their due process claim, J.A. 27-48, 127-28, and overlooking its own earlier ob-

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8. The district court did not in its oral opinion expressly premise the fee award on the fee provision in § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), see A. 35, 38, but referred instead to the fee authorization in the 1976 Fees Act, 42 U.S.C. § 1988, see A. 35, 43. Viewing the proceedings as a whole, the First Circuit concluded that the district court had awarded fees under both statutory authorizations. A. 6-21.

servation that petitioners ultimately "won, as a matter of state law, all that they originally sought," see supra p. 17 note 5, the First Circuit held that petitioners' success under the EAHCA of 1975 implicitly precluded any award of fees under the 1976 Fees Act, 42 U.S.C. § 1988. A. 7-17. The First Circuit also held that petitioners' success under the EAHCA of 1975 similarly precluded any award of fees for a violation of the Rehabilitation Act, although § 505(b) of that Act as amended in 1978 expressly authorizes fees, 29 U.S.C. § 794a(b). A. 17-21.

This Court granted the petition for a writ of certiorari to review the First Circuit's denial of fees to petitioners. J.A. 199.

SUMMARY OF ARGUMENT

This Court's unanimous decision in Maher v. Gagne, 448 U.S. 122 (1980), is control-

ling. In Maher, a prevailing plaintiff who asserted substantial constitutional claims which were not addressed was held to be entitled to fees under the 1976 Fees Act. Because petitioners here -- the prevailing plaintiffs -- asserted substantial constitutional claims which were not addressed, Maher compels that petitioners are entitled to fees under the 1976 Fees Act. This Court's reasoning in Maher further compels that petitioners, who alleged a substantial claim under § 504 of the Rehabilitation Act which similarly was not addressed, are also entitled to fees under § 505(b) of that Act.

Maher, which was neither analyzed nor distinguished by the First Circuit in its decision denying fees, requires reversal here.

I. The 1976 Fees Act authorizes an award of attorneys fees in "any action or

proceeding to enforce a provision of" § 1983. See 42 U.S.C. § 1988 (emphasis added). This litigation, brought to vindicate petitioners' constitutional rights to due process and equal protection through § 1983, is precisely such an action or proceeding.

A. When it enacted the 1976 Fees Act, Congress explained that plaintiffs with overlapping claims need not prevail on a claim entitling them to fees (e.g., a § 1983 claim) in order to be entitled to fees under the Act. Congress further explained that plaintiffs who allege a substantial constitutional claim through § 1983 which prudently is not addressed are entitled to fees so long as they prevail on a non-fee ground arising from a commmon nucleus of operative fact. Since petitioners here alleged substantial constitutional claims (i.e., that petitioner Tommy Smith was about to be excluded solely

because of his handicap from receiving a public education, in violation of equal protection, and was being excluded without a hearing, in violation of due process), and since petitioners in fact prevailed in this action or proceeding to enforce their constitutional rights, they are conclusively entitled to fees under the 1976 Fees Act. Maher v. Gagne, 448 U.S. 122 (1980).

B. Neither the absence of a fee authorization in the EAHCA of 1975, nor this Court's decision in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1 (1981), negates Congress' intent to authorize fees under the 1976 Fees Act. The fact that the EAHCA of 1975 does not itself authorize fees is not relevant in this case in view of Congress' express intent -- applied unanimously in Maher -- to authorize fees where plaintiffs prevail on an overlap-

ping non-fee claim arising from a common nucleus of operative fact. Middlesex County is inapposite to this case as there is no issue here about whether the EAHCA can be asserted through the "and laws" provision of § 1983. Rather, as this Court unanimously held in Maher, regardless of whether a federal statutory claim can be asserted through the "and laws" provision of § 1983, prevailing plaintiffs who assert substantial constitutional claims are entitled to fees under the 1976 Fees Act.

II. Section 505(b) of the Rehabilitation Act as amended in 1978, authorizes an award of attorneys fees in "any action or proceeding to enforce or charge a violation of a provision of" § 504. See 29 U.S.C. § 794a(b) (emphasis added). This litigation, in which petitioners sought to enforce and did charge a core violation of § 504, is such

an action or proceeding.

A. When Congress enacted § 505(b) in 1978, it incorporated into that fee authorization the legislative history of the 1976 Fees Act. Since petitioners here alleged a substantial claim under § 504 (i.e., that petitioner Tommy Smith was about to be excluded from participation in a federally funded program solely by reason of his handicap) and since petitioners prevailed in this action or proceeding to enforce their § 504 rights, petitioners are conclusively entitled to fees under § 505(b) for the same reasons as in Maher.

B. Petitioners' fee entitlement under § 505(b) is not affected by the omission of a fee authorization in the EAHCA of 1975 in view of Congress' express authorization of fees in 1978 for plaintiffs who

prevail in any action or proceeding to enforce or charge a violation of § 504. Middlesex County is totally irrelevant to this case in which petitioners asserted their substantial § 504 claim directly through the private right of action in § 505(a)(2) enacted by Congress in 1978 and not through the "and laws" provision of § 1983. Since Congress in 1978 expressly authorized fees for prevailing plaintiffs who allege a substantial § 504 claim, petitioners are entitled to fees under this Court's reasoning in Maher.

ARGUMENT

I. Petitioners, Who Alleged Substantial Due Process and Equal Protection Claims Through § 1983 and Who Ultimately Obtained All of the Relief Sought, Are Entitled To Fees Under the 1976 Fees Act

The 1976 Fees Act, 42 U.S.C. § 1988, authorizes an award of fees to the prevailing party in "any action or proceeding to enforce

a provision of" 42 U.S.C. § 1983.

Through the extensive and often explicit legislative history accompanying the 1976 Fees Act, Congress explained -- and this Court unanimously agreed in Maher v. Gagne, 448 U.S. 122 (1980) -- that plaintiffs with multiple, overlapping claims need not prevail on a claim specifically entitling them to fees in order to be entitled to fees under the Act.[9/] Instead, plaintiffs are entitled to fees, for example, "when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), quoted

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9. This does not necessarily mean that a prevailing plaintiff with multiple claims will be entitled to fees for time spent by counsel on all claims. Hensley v. Eckerhart, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Nevertheless, as this Court pointed out in Hensley, plaintiffs with overlapping claims cross the "statutory threshold" to fee entitlement "'if they succeed on any significant issue in litigation which achieves some of the benefit sought in bringing suit.'" 103 S.Ct. at 1939, 76 L.Ed.2d at 50, quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978).

with approval in Maher v. Gagne, 448 U.S. at 129.[10] Similarly, a plaintiff who asserts substantial constitutional claims through § 1983 and who "prevails on the non-fee claim arising out of a 'common nucleus of operative fact,'" is also entitled to fees. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976), quoted with approval in Maher v. Gagne, 448 U.S. at 132 n.15.

Petitioners here alleged substantial constitutional claims which were not ultimately ruled on in view of the fact that they had already obtained the result sought through their lawsuit. The legislative history of the 1976 Fees Act, to which this

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10. See also, e.g., Nadeau v. Helgemoe, 581 F.2d 275, 279-81 (1st Cir. 1978) (plaintiffs who obtained some of the benefit sought through a consent decree are entitled to fees); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 429 (8th Cir. 1970) (although "we find no injunction warranted here, we believe [plaintiff's] lawsuit acted as a catalyst" through which plaintiff obtained some of the benefit sought and was therefore entitled to fees), cited in S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), and in H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

Court has repeatedly deferred in resolving fee issues such as are present in this case,[11] compels the conclusion that petitioners were properly awarded fees by the district court.

A. As This Court Held in Maher v. Gagne, Congress Expressly Authorized Fees Under the 1976 Fees Act for Prevailing Plaintiffs Who Allege Substantial Constitutional Claims Which Are Not Addressed By the Trial Court

When Congress enacted the 1976 Fees Act to authorize an award of fees to the prevailing party in "any action or proceeding to enforce a provision of" § 1983, see 42 U.S.C. § 1988 (emphasis added), Congress specifically sought to benefit persons who claim depri-

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11. See, e.g., Maher v. Gagne, 448 U.S. 122, 129, 132 n.15 (1980) (relying on the Senate Report at 5, and on the House Report at 4 n.7); New York Gaslight Club v. Carey, 447 U.S. 54, 70-71 n.9 (1980) (relying on the House Report at 5, 8 n.16); Hanrahan v. Hampton, 446 U.S. 754, 756-58 (1980) (relying on the Senate Report at 2, 5; and on the House Report at 4, 7, 8); Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978) (relying on the House Report at 4 n.6).

vations of their constitutional rights.[12] Recognizing that constitutional claims often overlap with non-constitutional issues which are dispositive, Congress took care to authorize fees for prevailing plaintiffs so long as their constitutional claims are substantial. This is such a case.

1. Through the House Report accompanying the 1976 Fees Act, Congress explained that plaintiffs, who prevail in a context in which their constitutional claim is not addressed, should not be penalized by a denial of fees. Instead, where the unaddressed claim is a substantial constitutional claim,

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12. Entirely apart from any fee entitlement for plaintiffs who prevail on a non-fee statutory claim asserted through the "and laws" provision of § 1983 -- a question not presented in this case, see infra p.56 note 23 -- fees under the 1976 Fees Act were unquestionably intended for plaintiffs who claim deprivations of constitutional rights. As summarized by this Court in Maine v. Thiboutot, 448 U.S. 1, 9 (1980): "As was true with § 1983, a major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of constitutional civil rights."

fees are expressly authorized so long as the prevailing non-fee claim was overlapping, i.e., so long as it arose from a common nucleus of operative fact:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, supra, at 725.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976), quoted with approval in Maher v. Gagne, 448 U.S. at 132 n.15.

2. This express congressional intent

was held by this Court to be dispositive, in a context virtually identical to that here, in Maher v. Gagne. In fact, the foregoing legislative history was dispositive in two respects.

First, in determining whether Congress had authorized fees in a settled case in which there allegedly had been no constitutional or civil rights claim, this Court corrected defendant's mischaracterization of plaintiff's claim and unanimously held that plaintiff was entitled to fees under the 1976 Fees Act because she had alleged due process and equal protection claims which were found to be substantial but were not addressed by the lower courts. 448 U.S. at 128 n.10.[13]

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13. The majority in Maher also recognized, as an alternative holding, that plaintiff's Social Security Act claim fell within the meaning of the "and laws" language of § 1983 in view of Maine v. Thiboutot, 448 U.S. 1 (1980), and that plaintiff for this reason was also entitled to fees under the 1976 Fees Act. 448 U.S. at 128-29.

Three concurring Justices would not have reached this alternative "and laws" reason for granting fees [cont'd. on next pg]

Second, this Court in Maher rejected defendant's eleventh amendment defense by relying on the foregoing legislative history to hold that Congress had acted within its enforcement power when it authorized fees for plaintiffs who prevail on an overlapping non-constitutional claim.

> [C]learly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.

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since, in their view, plaintiff's assertion of "a substantial constitutional claim which 'remained in the case until the entire case was settled,'" was sufficient to entitle plaintiff to an award of fees. 448 U.S. at 134 (opinion of Justice Powell, joined by the Chief Justice and Justice Rehnquist, concurring in the judgment) (citation omitted).

448 U.S. at 132 (footnote omitted). In an accompanying footnote, the Court stated that the "legislative history makes it clear that Congress intended fees to be awarded where a . . . constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the [1976 Fees] Act," and thereafter quoted the relevant legislative history from the House Report in full. 448 U.S. at 132 n.15.

3. Based on Congress' intent and more recently on this Court's unanimous decision in Maher v. Gagne, the courts of appeals have widely ruled that plaintiffs are entitled to fees where they assert a substantial constitutional claim but prevail on a non-fee state law issue,[14] or on a non-fee federal

14. See, e.g., Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981) (successful state law tort claim coupled with a claim for unconstitutional use of excessive [cont'd. on next pg]

claim,[15] including a non-fee federal EAHCA claim.[16] As the courts of appeals have

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force); Seals v. Quarterly County Court of Madison County, 562 F.2d 390, 392-94 (6th Cir. 1977) (successful state law claim coupled with unaddressed vote dilution claims under the fourteenth and fifteenth Amendments); cf. Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423, 426-27 (8th Cir. 1978) (success through interpretation of ambiguous rules and regulations coupled with unaddressed due process and equal protection claims).

15. See, e.g., Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1124-25 (9th Cir. 1981) (successful claim under the Federal Aid for Highways Act coupled with unaddressed due process and equal protection claims); cf. Doe v. Marshall, 622 F.2d 118, 119-20 (5th Cir. 1980) (successful claim under the Rehabilitation Act prior to the 1978 amendment authorizing fees).

Prior to this Court's decision in Maine v. Thiboutot, 448 U.S. 1 (1980), the courts of appeals had held that plaintiffs were entitled to fees where they assert substantial constitutional claims but prevail on a non-fee Social Security Act claim. See, e.g., Oldham v. Ehrlich, 617 F.2d 163, 166-68 (8th Cir. 1980) (successful Social Security Act claim coupled with unaddressed equal protection claim); Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979) (successful Social Security Act claim coupled with unaddressed equal protection claim), cert. denied, 446 U.S. 913 (1980); Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978) (successful claim under the Social Security Act coupled with unaddressed fourteenth amendment claim); cf. Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977) (successful Social Security Act claim asserted through § 1983), cert. denied, 438 U.S. 916 (1978).

[cont'd. on next pg]

generally recognized, awarding fees in these situations, besides being required, serves Congress' purpose of encouraging vindication of constitutional rights.[17]

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16. See, e.g., Espino v. Besteiro, 708 F.2d 1002, 1006-10 (5th Cir. 1983) (successful EAHCA claim coupled with unaddressed due process and equal protection claims); Monahan v. Nebraska, 687 F.2d 1164, 1172 (8th Cir. 1982) (successful EAHCA claim coupled with unaddressed due process claim), cert. denied, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); Robert M. v. Benton, 671 F.2d 1004, 1005-06 (8th Cir. 1982) (successful EAHCA claim coupled with unaddressed due process and equal protection claims); Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982) (successful EAHCA claim coupled with unaddressed fourteenth amendment claims); cf. Hastings v. Maine-Endwell Central School Dist., 676 F.2d 893, 897 (2d Cir. 1982) (successful EAHCA claim and successful due process claim); contra Department of Educ. v. Katherine D., No. 82-4096 (9th Cir. Nov. 7, 1983).

17. See e.g., Espino v. Besteiro, 708 F.2d 1002, 1010 (5th Cir. 1983) (allowing "a court to deny § 1988 fees by granting relief on the basis of a non-fee statute would . . . undermine Congress' intent in enacting § 1988 to create an incentive for plaintiffs to vindicate violations of their constitutional rights by bringing § 1983 actions."). The Fifth Circuit also pointed out, as a policy consideration, that a denial of fees to plaintiffs who prevail through judgment other than on their constitutional claim would provide defendants with a "powerful disincentive to settlement" in view of the fact that plaintiffs who allege substantial constitutional claims and who ultimately prevail through settlement are entitled to fees. Id.

4. Congressional intent, this Court's decision in Maher, and the foregoing authority conclusively establish petitioners' fee entitlement here since petitioners asserted substantial constitutional claims which the district court ultimately and properly did not address in view of petitioners' dispositive success resulting from the construction of two state statutes.

The substantiality of petitioners' due process claim was established by the due process injunctive relief enjoyed by petitioners throughout this litigation, J.A. 27-48, 127-28; and by the district court's denial of respondents' motion to dismiss on the ground that the appropriateness of petitioners' § 1983 due process cause of action was the law of the case, J.A. 179.

As to petitioners' equal protection claim of discriminatory exclusion from

school, the district court specifically found that "the equal protection claim is colorable and non-frivolous," and that accordingly "enough has been said to establish that the [petitioners] have made a substantial constitutional claim." A. 13.[18/]

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18. Even without these rulings and findings, the substantiality of petitioners' due process and equal protection claims was evident from contemporaneous court decisions.

The discriminatory exclusion from school of handicapped children in factual contexts similar to that of petitioner Tommy Smith led to the seminal constitutional decisions in Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866, 874-76 (D.D.C. 1972) (holding that such exclusion violates equal protection and due process), and in Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 293-97 (E.D. Pa. 1972) (three-judge court) (holding that such exclusion gives rise to substantial due process and equal protection claims). Similar court decisions, recognizing that a free education is a matter of constitutional right for handicapped children, followed Mills and PARC. See, e.g., Lebanks v. Spears, 60 F.R.D. 135, 137-38 (E.D. La. 1973) (approval of a consent decree as required by minimal constitutional guarantees of due process and equal protection); cf. Kruse v. Campbell, 431 F. Supp. 180, 186-89 (E.D. Va. 1977) (three-judge court) (state exclusion of handicapped children from a free appropriate education violates equal protection), vacated and remanded "with direction to decide the claim based on the federal statute § 504 of the federal Rehabilitation Act of 1973," 434 U.S. 808 (1977).

The substantiality of petitioners' equal protec- [cont'd. on next pg]

Subsequent to its preliminary rulings in petitioners' favor on their due process claim, the district court followed well established judicial policy by avoiding an unnecessary ruling on constitutional claims where the resolution of non-constitutional issues may be and ultimately is dispositive.[19] The

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tion and due process claims is also evident from the decisions by this Court in such cases as Plyler v. Doe, 457 U.S. 202 (1982) (equal protection); Carey v. Piphus, 435 U.S. 247 (1978) (due process); and Wood v. Strickland, 420 U.S. 308 (1975) (due process).

19. This judicial policy was summarized by Justice Brandeis nearly fifty years ago in Ashwander v. TVA, 297 U.S. 288, 347 (1936): federal courts "will not pass upon a constitutional question although properly presented in the record, if there is also present some other ground upon which the case may be disposed of."

Well before Justice Brandeis' articulation of this policy, the Court had applied the policy to prefer an initial construction of a state statute so as to possibly avoid adjudication of constitutional issues. Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909); cf. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

This longstanding judicial policy was more recently applied by this Court to encourage initial adjudication of the statutory rights -- as opposed to the constitutional rights -- of handicapped children to a free public education. See Campbell v. Kruse, 434 U.S. 808 (1977), vacating and remanding 431 F. Supp. 180 (E.D. Va. 1977) (three-judge court), discussed supra p.41 note 18.

district court here adhered to this judicial policy on two occasions. Initially, after observing that petitioners "already enjoy preliminary injunctive relief" based on their due process claim, J.A. 121, the district court certified to the Rhode Island Supreme Court two state law questions "in order to avoid unnecessary adjudication of constitutional and federal claims," J.A. 122, 124-25.

The policy objective properly pursued by the district court was in fact achieved through the Rhode Island Supreme Court's decision rendered in favor of petitioners' position. J.A. 129-51. As the district court stated in its final order on the merits:

> In accordance with the Rhode Island Supreme Court's opinion in Smith v. Cumberland School Committee, ___ R.I. ___, 415 A.2d 168 (1980), Tommy is entitled to have the full cost of said special education and related services paid by the Cumberland School Committee so long as he is of qualifying

age and resides in the Cumberland School District.

J.A. 191-92 The district court thus ultimately avoided an unnecessary ruling on the federal statutory and constitutional issues: "It having been established that Thomas Smith III was, and is, entitled to be educated at the cost of the Cumberland School Committee as a matter of state law, plaintiffs have obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims." J.A. 193.

Since petitioners obtained more than just "some of the benefit the parties sought in bringing suit," Hensley v. Eckerhart, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983), petitioners were prevailing parties entitled to fees. As this Court concluded in Maher v. Gagne, 448 U.S. at 133 (citation omitted), in approving a fee award for a plaintiff who

ultimately prevailed by the same non-constitutional route as petitioners here prevailed: "such a fee award 'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'"

B. The Existence of Overlapping Rights Under the Constitution and Under the EAHCA Has No Affect on Congress' Authorization of Fees Under the 1976 Fees Act.

Disregarding Congress' intent and this Court's unanimous decision in Maher v. Gagne, 448 U.S. 122 (1980), the First Circuit reversed the district court's fee award and held that petitioners were not entitled to fees under the 1976 Fees Act. A. 7-17.

The First Circuit reached this decision through two mistatements of the applicable law. First, the court of appeals held that

there was no congressional intent to authorize fees to plaintiffs who assert unaddressed substantial constitutional claims and prevail on an overlapping claim under a federal statute which itself does not expressly authorize fees. Second, the court of appeals held that support for its position could be found in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1 (1981).

In addition to the fact that both grounds asserted by the First Circuit were premised upon a mischaracterization of the manner in which petitioners ultimately prevailed in this case,[20] there is no legal

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20. According to the First Circuit, petitioners ultimately prevailed not through interpretations of state law but instead under the EAHCA: "Not only was [the] EAHCA the foundation of [petitioners'] victory," A. 9, but it was the EAHCA under which relief was obtained here," A. 11.

The First Circuit's mischaracterization of the various court rulings granting petitioners' success in this case is evident from those rulings, including an earlier ruling by the First Circuit. The district court, in its order certifying the two state law issues to the Rhode Island Supreme Court, stated that certification was being undertaken "in order to avoid [cont'd. on next pg]

support for the result reached by the First Circuit either in its decision or as a matter of law.

1. Premised upon its mistaken view of the manner in which petitioners prevailed, see supra pp.46-47 note 20, the First Circuit

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unnecessary adjudication of constitutional and federal claims." J.A. 122, 124-25. The Rhode Island Supreme Court, in its decision favorable to petitioners, ruled only on the two state law questions which had been certified to it. J.A. 129-51. The district court thereafter, in its final order on the merits, held that "as a matter of state law, plaintiffs have obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims." J.A. 193. And the First Circuit, in its unreported decision affirming the final orders on the merits, pointed out that petitioners had "won, as a matter of state law, all that [they] originally sought." See supra p.17 note 5.

To be sure, the strength of petitioners' federal claim under the EAHCA no doubt contributed to their ultimate victory under state law. J.A. 119, 134-38. Yet, the same may be said about the strength of petitioners' overlapping federal claim under § 504 of the Rehabilitation Act, as well as about the strength of petitioners' due process and equal protection claims. The fact of the matter, however, is that petitioners ultimately prevailed without a final adjudication of either their constitutional claims or their federal statutory claims.

held that petitioners' success under the EAHCA, a federal statute which does not itself expressly authorize fees, barred petitioners from receiving fees since Congress nowhere indicated its intent to allow fees where the same facts give rise to substantial constitutional claims which are not addressed. As the First Circuit explained:

> The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims . .. . Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here.

A. 15-16. Stated otherwise, "the question before us remains one of finding affirmative congressional sanction for fees in this situation. We can find none." A. 11.

The affirmative congressional sanction

which the First Circuit overlooked, and in fact never cited, is found in the House Report accompanying the 1976 Fees Act -- enacted one year after the EAHCA of 1975 -- which expressly authorizes fees in this overlapping situation "so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'" H.R. Rep. No.1558, 94th Cong., 2d Sess. 4 n.7 (1976). See supra p.34. As this Court concluded in Maher v. Gagne, 448 U.S. 122, 132 n.15 (1980): "The legislative history makes it clear that Congress intended fees to be awarded where a . . . constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act."

The First Circuit, in effect, turned congressional intent and this Court's unanimous decision in Maher on their heads since the First Circuit used the very predicate for

fee entitlement -- a substantial constitutional claim which overlaps with a non-fee statutory claim arising from a common nucleus of operative fact -- as the reason for denying fees. This paradoxical result is unquestionably wrong as it completely contradicts both Congress' intent and this Court's decision in Maher.

2. Premised again upon its view that petitioners prevailed exclusively under the EAHCA of 1975, see supra 46-47 note 20, and flowing from its misperception that Congress had not authorized fees under the 1976 Fees Act where substantial constitutional claims are asserted, see supra at pp.47-49, the First Circuit stated that "support" for its legal view was "found in the Supreme Court's recent discussion of section 1983 in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1, 101 S.Ct.

2615, 69 L.Ed.2d 435 (1981)." A. 13. Apparently unaware that this Court in Middlesex County held only that the substantive federal statutory rights at issue there could not themselves be asserted through the "and laws" provision of § 1983, the First Circuit illogically concluded not that the EAHCA of 1975 could not be asserted through the "and laws" provision of § 1983, but rather that the EAHCA of 1975 somehow precludes the availability of fees under the 1976 Fees Act for prevailing plaintiffs who assert substantial constitutional claims through § 1983.[21] In

21. The First Circuit quite specifically held "only that where, as here, the constitutional allegations arise from the same factual underpinnings as the [EAHCA] statutory claims, section 1988 does not apply." A. 17 (emphasis added).

In reaching this decision as to fee entitlement, the First Circuit recognized that the EAHCA does not "in any way limit the substantive scope of a handicapped child's constitutional rights" which still can be asserted through § 1983. A. 17. But see Department of Educ. v. Katherine D., No. 82-4096 (9th Cir. Nov. 7, 1983). This part of the First Circuit's decision is, of course, entirely correct, since Congress' purpose in enacting the EAHCA under the Spending Clause was to assist those states which accept [cont'd. on next pg]

the First Circuit's profoundly mistaken

EAHCA funding in meeting their established legal obligations to handicapped children, not to supplant the enforcement of handicapped children's constitutional rights through § 1983. Nothing in the legislative history of the EAHCA of 1975, in fact, supports any limitation on the enforcement of constitutional rights through § 1983.

Congress' recognition of the presumed enforceability of the constitutional rights of handicapped children appears throughout the legislative history accompanying the EAHCA. At the outset, Congress recognized that its consideration of the EAHCA "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. Rep. No. 168, 94th Cong., 2d Sess. 6 (1975). Two of the landmark cases, Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), and Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), both of which established that the exclusion of handicapped children from a free public education violates equal protection and due process, were repeatedly cited by Congress. See S. Rep. No. 168, 94th Cong., 1st Sess. 6-7, 22-23 (1975); H.R. Rep. No.332, 94th Cong., 1st Sess. 3-4 (1975); see generally Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 180 n.2, 192-200 (1982).

Based on Congress' belief that these landmark "court orders must be implemented," S. Rep. No. 168, 94th Cong., 1st Sess. 17 (1975), Congress enacted the EAHCA "to provide assistance to States in carrying out their responsibilities under State law and the Constitution of the United States," id. at 13 (emphasis added); see also 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams); id. at 19504 (remarks of Sen. Humphrey). Congress in fact could not have been more explicit in its intent that the new EAHCA funding, as well as other federal funding, be utilized by "States to assist them in carrying out their responsibilities

[cont'd. on next pg]

view: "The fact that the section 1983 claims

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under State laws, State Constitutions, and the U.S. Constitution," S. Rep. No. 168, 94th Cong., 1st Sess. 23 (1975) (emphasis added).

By providing judicial review to insure that participating states were complying with the restrictions which accompanied the use of EAHCA funding, see Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 204-08 (1982), Congress did not eliminate wholesale the enforcement of the state and other federal statutory rights of handicapped children, much less enforcement of their federal constitutional rights through § 1983. Congress quite specifically recognized that it was "discriminatory treatment and exclusion which Court cases [and] State and Federal laws are designed to remedy." S. Rep. No. 168, 94th Cong., 1st Sess. 27-28 (1975). And, lest there be any doubt, Congress specifically stated that it did "not intend" EAHCA enforcement "to limit the rights of individuals to seek redress of grievances through other avenues such as bringing civil actions[s] in Federal or State courts to protect and enforce the rights of handicapped children under applicable law." Id. at 26.

This express congressional recognition and preservation of the alternative judicial remedies available to handicapped children forecloses any inference that Congress in 1975 intended through enactment of the EAHCA to repeal by implication all other means of enforcing the rights of handicapped children. See Morton v. Mancari, 417 U.S. 535, 549-50 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). Congressional intent, of course, is controlling. Id; compare Johnson v. Railway Express Agency, 421 U.S. 454, 459-61 (1974), and Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416-17 (1968), with Brown v. General Services Admin., 425 U.S. 820, 825-29 (1976).

Even if Congress had manifested a contrary intent, it still could not eliminate the enforceability of constitutional rights through § 1983 without

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alleged here are based upon independent constitutional violations rather than the EAHCA itself is immaterial." A. 15.

The First Circuit's reasoning again is absolutely wrong since Middlesex County has no relevance to this case. The First Circuit's mistake is apparent from Middlesex County itself, a case in which this Court addressed only the question of whether the right of action allowed through the "and laws" provision in § 1983, see Maine v. Thiboutot, 448 U.S. 1 (1980), encompassed two federal water pollution statutes. See 453

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expressly amending § 1983. As this Court held in an analogous context: although "Congress deliberately provided no damages remedy in the Public Accommodations Act itself," although Congress specified "that the injunctive remedy of § 206 [of the Act] was the 'exclusive means of enforcing the rights based on'" the Act, and although "the legislative history makes quite plain that Congress did not intend that violations of the Public Accommodations Title be enforced through the damages provision of § 1983," it nonetheless is "evident that enforcement of one's constitutional rights under § 1983 is not 'inconsistent' with the Public Accommodations Act." Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-51 n.5 (1970).

U.S. at 19-21. Answering this question of legislative intent in the face of total congressional silence, this Court concluded that the "comprehensive enforcement mechanisms" in the federal statutes demonstrated that "Congress intended" to foreclose the assertion of those statutes through the "and laws" provision of § 1983.[22/] 453 U.S. at 20-21.

Although the exception to the "and laws" provision of § 1983 recognized in Middlesex County might be relevant where a plaintiff attempts to enforce the EAHCA through the "and laws" provision of § 1983, there is no

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22. In examining this question, the Middlesex County Court pointed out that it had "recognized two exceptions to the application of § 1983 to statutory violations." 453 U.S. at 19. Those exceptions, initially proposed in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 67 (1981), flow from determinations about "(i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights' under § 1983." 453 U.S. at 19. Neither of these questions has any relevance to the availability of fees pursuant to congressional authorization, or to the enforceability of constitutional rights through § 1983.

"and laws" issue in this case.[23] Middlesex County accordingly is inapposite, as it could have no legal effect upon the validity of Congress' decision in 1976 to authorize fees to prevailing plaintiffs who allege substantial constitutional claims through § 1983.

Congressional intent here is unambiguous. Congress in 1976 expressly authorized fees in "any action or proceeding to enforce a provision of" § 1983 where the prevailing plaintiffs allege unaddressed substantial constitutional claims. This authorization conclusively establishes both Congress' awareness of the occasional overlap of constitutional and statutory rights, and also Congress' intent to make fees available to

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23. Petitioners' EAHCA claim in this case was asserted directly and only through the express right of action contained in § 615(e)(2) of the EAHCA, 20 U.S.C. § 1415(e)(2). See J.A. 50, 153.

There thus has never been an "and laws" argument in this case, Cert. Pet. at 13-14 n.3, 19 n.6, and petitioners accordingly did not present such a question to this Court, Cert. Pet. at i-ii.

prevailing plaintiffs in this context without disturbing the established rule of avoiding constitutional adjudications wherever possible. Lest there be any doubt, in Maher v. Gagne, 448 U.S. 122 (1980) -- decided the same day as Maine v. Thiboutot, 448 U.S. 1 (1980) -- this Court relied on the foregoing congressional intent in unanimously holding that, apart from any entitlement to fees flowing from plaintiff's assertion of a federal statutory claim through the "and laws" provision of § 1983, the plaintiff in any event was entitled to fees under the 1976 Fees Act because plaintiff had alleged substantial though unaddressed constitutional claims. 448 U.S. at 128 n.10 & 132 n.15 (majority opinion); id. at 134 (concurring opinion).

As Justice Stevens pointed out in his majority opinion in Maher, "even if the Court had reached the opposite result in Thiboutot"

by holding that the federal statute could not be asserted through § 1983, the plaintiff in Maher still was entitled to fees based on her unaddressed constitutional claims. 448 U.S. at 128 n.10. Justice Powell, in his concurring opinion, agreed since "Congress has made plain its intent that fees be awarded to 'prevailing' parties in these circumstances." Id. at 134. These are the same circumstances here.

II. Apart From Petitioners' Fee Entitlement Under the 1976 Fees Act, Petitioners Are Entitled to Fees Under the 1978 Fee Authorization in the Rehabilitation Act

Section 505(b) of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 794a(b), authorizes an award of fees to the prevailing party in "any action or proceeding to enforce or charge a violation of" § 504 of the Rehabilitation Act, 29 U.S.C. § 794. When Congress enacted this fee authorization in

1978[24/] -- two years after the enactment of the 1976 Fees Act, and three years after enactment of the EAHCA of 1975 -- Congress explained that prevailing plaintiffs are entitled to fees under § 505(b) in the same manner that prevailing plaintiffs are entitled to fees under the 1976 Fees Act.

Petitioners here alleged a substantial claim under § 504 of the Rehabilitation Act; they enjoyed a private right of action under § 505(a)(2) to enforce that claim, see infra pp. 71-72 note 31; and they in fact prevailed in this action or proceeding. They accordingly are entitled to fees under § 505(b)

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24. The 1978 fee provision was contained in the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2982, which amended the Rehabilitation Act of 1973 by adding § 505(b) authorizing fees. The fee provision was reported favorably in the Senate Report [S. Rep. No. 890, 95th Cong., 2d Sess. 19-20 (1978)], the House Report [H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978)], and the Conference Report [H.R. Rep. No.1780, 95th Cong., 2d Sess. 93 (1978)]. It was explained in considerable detail on the floor of the Senate, see infra pp.61-62 note 26.

based on congressional intent and on the unanimous reasoning of this Court in Maher v. Gagne, 448 U.S. 122 (1980).

A. Congress Expressly Authorized Fees Under § 505(b) of the Rehabilitation Act, as Amended in 1978, for Prevailing Plaintiffs Who Allege Substantial Claims Under § 504 of the Rehabilitation Act

The fee authorization in § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), contains language which is virtually identical to that in the 1976 Fees Act, 42 U.S.C. § 1988.[25] In enacting § 505(b), Congress not only explained that it intended § 505(b) to

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25. The fee authorization in § 505(b) provides as follows:

> In any action or proceeding to enforce or charge a violation of a provision of [§ 504], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. § 794a(b) (emphasis added). With the exception of the words which are underscored or bracketed above, the language in § 505(b) is identical to that in the 1976 Fees Act, 42 U.S.C. § 1988.

be interpreted in the same manner as the 1976 Fees Act, but also incorporated into § 505(b) the legislative history of the 1976 Fees Act.[26] In view of congressional intent --

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26. Senator Cranston, the author of § 505(b), fully explained the coverage and effect of this fee authorization in his remarks on the floor of the Senate:

> Mr. President, an amendment which I have authored, contained in section 505(b) of the reported bill, provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United States, and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94-559).
>
> * * *
>
> Mr. President, I emphasize that it is intended that interpretation of the attorney's fee provision in the committee bill be analagous to interpretations of the Civil Rights Attorney's Fees Act of 1976, Public Law 94-559. The legislative history and expressions of legislative intent with respect to Public Law 94-559 are applicable to the new section 505(b).

124 Cong. Rec. 30346 (1978). See also id. at 30347.

Subsequent to passage by the Senate and by the House and subsequent to the House-Senate Conference, see supra p.59 note 24, the fee provision was explained again on the floor of the Senate, this time by Senator Stafford, the ranking member of the Subcommittee on the Handicapped. Senator Stafford initially observed that "section 505(b) of the conference bill provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United States and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (P.L. 94-

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articulated in 1978 and in 1976 -- petitioners are entitled to fees under § 505(b).

1. As this Court pointed out in Maher v. Gagne: "Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed

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559)." 124 Cong. Rec. 37507 (1978). He then stated: "I emphasize that it is intended that interpretation of the attorney's fees provision in the conference bill be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976; Public Law 94-559. The legislative history and expressions of legislative intent with respect to Public Law 94-559 are applicable to the new section 505(b)." Id. at 37508.

The legislative history of the Fees Act accordingly is fully applicable to fee awards under the Rehabilitation Act. This is also true because of the fact that the Fees Act "is legislation similar in purpose and design to [the Rehabilitation Act's] fee provision." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980).

when they vindicate rights through a consent judgment or without formally obtaining relief.'" 448 U.S. at 129, quoting from S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976); see also H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

This congressional intent not only was incorporated into § 505(b), see supra pp.61-62 note 26, but also expressly accompanied the enactment of § 505(b): "a party should be considered to have prevailed when rights are vindicated . . . through a consent judgment or, even, without the granting of formal relief." 124 Cong. Rec. 30347 (1978) (remarks of Sen. Cranston); see also 124 Cong. Rec. 37508 (1978) (remarks of Sen. Stafford).

2. Petitioners here both vindicated their rights and prevailed in "an action or proceeding to enforce or charge a violation

of" § 504. They accordingly are ordinarily entitled to fees under § 505(b), as the First Circuit recognized below, so long as they presented "a substantial section 504 claim even if they [did] not ultimately prevail under that claim. United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980)." A. 18.[27/]

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27. See also, e.g., Disabled in Action v. Mayor of Baltimore, 685 F.2d 881 (4th Cir. 1982); Pratt v. Bd. of Educ. of Frederick County, 674 F.2d 259 (4th Cir. 1982).

This standard, under which prevailing plaintiffs are entitled to fees so long as they assert a substantial but unaddressed § 504 claim, is consistent with congressional intent both under § 505(b) of the Rehabilitation Act and under the 1976 Fees Act, see supra pp. 62-63, and is also consistent with the standard which authorizes fees under the 1976 Fees Act for prevailing plaintiffs who assert substantial but unaddressed constitutional claims, see supra pp.29-58.

This standard for authorizing fees is distinguishable from situations where courts are otherwise obligated to rule on a separate substantial claim under a federal statute which also authorizes fees. See Morales v. Haines, 486 F.2d 880 (7th Cir.1973) (since the district court declined to address plaintiff's separate claim of racial discrimination in housing under Title VIII of the Civil Rights Act of 1968, and also failed to address plaintiff's attendant prayer under Title VIII for compensatory damages, punitive damages, and attorneys fees, the case must be remanded for findings as to discrimination, as to [cont'd. on next pg]

In this case, involving Tommy Smith's exclusion from a program or activity receiving federal financial assistance solely because he was emotionally disturbed as well as orthopedically impaired, there is no question that petitioners presented a substantial claim under under § 504, nor should there be any doubt that they in fact would have prevailed under § 504 had the district court

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damages if any, and hence also as to Title VIII fee entitlement).

Relying on Morales, Congress indicated through the legislative history accompanying the 1976 Fees Act that a plaintiff in this situation, who prevails as did the plaintiff in Morales on a non-fee claim, "is entitled to a determination [on the claim accompanied by the fee authorization] for the purpose of awarding counsel fees. Morales v. Haines, 486 F.2d 880 (7th Cir. 1973)." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976). Morales in this context defines congressional intent, see Hensley v. Eckerhart, 103 S.Ct. 1933, 1936-38, 76 L.Ed.2d 40, 48-49 (1983), as requiring a ruling on a fee claim only where separate substantive rights and additional remedies which flow therefrom have not been addressed. Congress thus did not require a ruling on a separate statutory claim solely for the purpose of determining fee entitlement since, as a general principle, prevailing plaintiffs with unaddressed substantial claims are entitled to fees.

chosen to address that claim rather than avoiding a ruling on petitioners' federal claims. At its core, § 504 bars discriminatory exclusion of handicapped individuals.[28] Petitioners accordingly presented a substantial and prevailing § 504 claim

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28. The language of § 504 itself dictates such a result:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (emphasis added). See, e.g., John A. v. Gill, 565 F. Supp. 372, 383 (N.D. Ill. 1983) ("at a minimum, § 504 requires a state which receives federal funds for public education not to exclude a handicapped child from its educational program for reasons related solely to his handicap"); see generally Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979) (§ 504 "requires . . . that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap'"); New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 853 (10th Cir.1982) ("close scrutiny of Southeastern Community College and other authorities reveals that a federally-funded education system may be found in violation of Section 504 where the entity's practices preclude the handicapped from obtaining system benefits realized by the non-handicapped").

without regard to the applicability of § 504 to other education issues,[29] and they thus are entitled to fees under § 505(b).

B. The Provision of Overlapping Rights Under § 504 of the Rehabilitation Act and Under the EAHCA Has No Effect on the Availability of Fees Under § 505(b) of the Rehabilitation Act

Disregarding Congress' intent, the First Circuit held that petitioners were not entitled to a fee award under § 505(b) "for substantially the same reasons that we reject an attorneys' fees award under section 1988." A. 19. In other words, based upon its misperception that petitioners had prevailed exclusively under the EAHCA, see supra pp.46-47 note 20, the First Circuit found no congressional sanction for fees and believed

29. See generally Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1579-80 (11th Cir. 1983); Tatro v. Texas, 703 F.2d 823, 831-32 (5th Cir. 1983), cert. granted, No. 83-558 (Sup. Ct. Dec. 5, 1983); see also 34 C.F.R. §§ 104 et seq. (1980) (DOE), formerly 45 C.F.R. §§ 84 et. seq. (1978) (HEW).

that this Court's decision in Middlesex County supported a denial of fees.[30] A. 17-

30. Just as the First Circuit held that the EAHCA did not "in any way limit the substantive scope of a handicapped child's constitutitonal rights" under § 1983, A. 17, see supra pp.51-54 note 21, the First Circuit similarly held that the EAHCA did not "preclude 'overlapping' actions under section 504," A. 20. In this holding the First Circuit was plainly correct since Congress in enacting the EAHCA could not be said to have impliedly repealed Congress' prior and subsequent enactments guaranteeing enforcement of § 504 rights.

Not only is there no "clear statement" that Congress intended to repeal or supplant § 504 rights, but there instead is affirmative congressional intent to preserve enforcement of overlapping rights. For example, throughout the legislative history accompanying the EAHCA of 1975, Congress repeatedly recognized the effectiveness of and preserved all alternative means of enforcing the overlapping rights of handicapped children. See supra pp.51-54 note 21. Additionally, Congress referred specifically and approvingly to the importance of enforcing § 504 rights. S. Rep. No. 168, 94th Cong., 1st Sess. 12, 28 (1975); H.R. Rep. No. 332, 94th Cong., 1st Sess. 4 (1975).

Three years later, in 1978, Congress amended the Rehabilitation Act by adding through § 505(a)(2) an express Title VI enforcement procedure for enforcing § 504 rights, see infra pp.71-72 note 31, an action which would have been essentially meaningless in the educational context had Congress earlier intended to preclude § 504 enforcement. Congress, however, certainly did not intend to preclude § 504 enforcement, for it enacted § 505(a)(2); it referred approvingly to the then-existing § 504 regulations [45 C.F.R. §§ 84 et seq., 42 Fed. Reg. 22676 (May 4, 1977)]; and it stated that the amendment "codifies existing practice." S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978).

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21. The First Circuit erred on both counts.

1. Just as the First Circuit overlooked, and never cited, the legislative history of the 1976 Fees Act when it held that fees were unavailable under that Act to prevailing plaintiffs who vindicated their rights or who prevailed in the context of asserting substantial constitutional claims arising from a common nucleus of operative fact, the First Circuit overlooked and never cited the 1978 legislative history accompanying § 505(b).

For these reasons, among others, the courts have widely recognized that Congress through the EAHCA and the Rehabilitation Act created concurrent rights and remedies. Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1578-80 (11th Cir. 1983); Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660, 661-66 (D.D.C. 1982); see generally Miener v. Missouri, 673 F.2d 969, 973-75 (8th Cir. 1982), cert. denied, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982); S-1 v. Turlington, 635 F.2d 342, 345-50 (5th Cir. 1981), cert. denied, 454 U.S. 1030 (1981); contra Department of Educ. v. Katherine D., No. 82-4096 (9th Cir. Nov. 7, 1983).

That 1978 legislative history, which incorporates the legislative history of the 1976 Fees Act, conclusively establishes Congress' intent to authorize fees under § 505(b) to prevailing plaintiffs such as petitioners here who vindicate their rights in "any action or proceeding to enforce or to charge a violation of a provision" of § 504 or who prevail in any such "action or proceeding" having alleged a substantial § 504 claim which was prudently not addressed. See generally Maher v. Gagne.

2. The First Circuit, proceeding without the benefit of Congress' intent in authorizing fee awards under § 505(b), purported to find support for its mistaken position in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1 (1981), by concluding that "the EAHCA's comprehensive remedial scheme entails a rejection of fee-

shifting that properly limits the fees provision of the more general Rehabilitation Act."[31/] A. 20.

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31. The First Circuit was also of the view that a denial of fees under § 505(b) was "particularly appropriate where the very existence of a private right of action under § 504 is the subject of doubt." A. 20-21. This reason for denying fees under § 505(b) is simply wrong as there unquestionably is a private right of action to enforce § 504.

Although it is true that this Court has not squarely held that § 504 is enforceable by a private right of action, Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979); cf. University of Texas v. Camenisch, 451 U.S. 390 (1981), the Court certainly has implied that such a right of action does exist, Campbell v. Kruse, 434 U.S. 808 (1977), vacating and remanding 431 F. Supp. 180 (E.D. Va. 1977).

There in any event is no longer any doubt about the existence of a private right of action to enforce § 504, 29 U.S.C. § 794, in view of Congress' enactment in 1978 of § 505(a)(2), 29 U.S.C. § 794a(a)(2), which expressly incorporated the enforcement provisions of Title VI, and in view of this Court's decisions in Guardians Ass'n v. Civil Service Comm'n of New York, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), and Cannon v. University of Chicago, 441 U.S. 677 (1979).

The new § 505(a)(2), 29 U.S.C. § 794a(a)(2), provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

This enforcement provision, like the fee provision, [cont'd. on next pg]

Reliance on Middlesex County is again entirely misplaced, as is evident from the decision itself. See supra pp.50-58. This

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see supra p.59 note 24, was added to the Rehabilitation Act of 1973 by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2982. See generally Community Television of Southern California v. Gottfried, 103 S.Ct. 885, 892, 74 L. Ed.2d 705, 716 (1983).

The legislative history accompanying this enforcement provision firmly establishes Congress' intent not only that § 504 was to be enforced in the same manner as Title VI but also that § 504 was subject to a private right of action. See S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978); H.R. Rep. No. 1780, 95th Cong., 2d Sess. 93 (1978); 124 Cong. Rec. 30346-47 (1978) (remarks of Sen. Cranston); 124 Cong. Rec. 37507-08 (1978) (remarks of Sen Stafford).

Given the explicit language of § 505(a)(2) and its legislative history, § 504 may be enforced through a private right of action. Guardians Ass'n v. Civil Service Comm'n of New York, 103 U.S. 3221, 77 L.Ed.2d 866 (1983) (private right of action under Title VI for prospective relief); Cannon v. University of Chicago, 441 U.S. 677 (1979) (private right of action under Title IX because of Congress' belief that a private right of action existed under Title VI). Even prior to this Court's decision in Guardians Ass'n, the courts of appeals were virtually unanimous in their view of that a private right of action did exist under § 504. See, e.g., Miener v. Missouri, 673 F.2d 969, 973-74 (8th Cir. 1982) (citing cases), cert. denied, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982); Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1376-80 (10th Cir. 1981) (citing cases); Kling v. Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980) (citing cases).

Court in Middlesex County addressed only whether the rights created by certain federal statutes could be asserted through the "and laws" provision of § 1983, see 453 U.S. at 19-21, not whether a specific statute authorizing fees for enforcement of a federal statutory right (here § 505(b) fees for enforcing § 504 rights) could be altogether eliminated by an earlier-enacted general statute (here the EAHCA of 1975).

Middlesex County, in fact, would be relevant here only if petitioners had claimed that they could enforce § 504 rights through the "and laws" provision of § 1983 and thereby obtain fees under the 1976 Fees Act. Since petitioners here never made such a claim, and since § 504 is itself enforceable by a private right of action, see supra pp.71-72 note 31, Middlesex County is simply inapposite.

Even if Middlesex County were somehow

relevant here, its test is a means to assist in determining congressional intent, not a device to defeat the will of Congress. Neither under that test, nor under any principle of statutory construction, can Congress' general action in one year be held to eliminate a specific statute enacted by Congress three years later.

The omission of fees from the EAHCA of 1975 has no debilitating effect upon Congress' decision in 1978 to authorize fees under § 505(b) in "any action or proceeding to enforce or to charge a violation of a provision of" § 504. Since petitioners alleged a substantial § 504 claim which was not addressed in this action or proceeding through which they prevailed, they are entitled to fees. Maher v. Gagne, 448 U.S. 122 (1980).

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the First Circuit should be reversed.

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Respectfully submitted,

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